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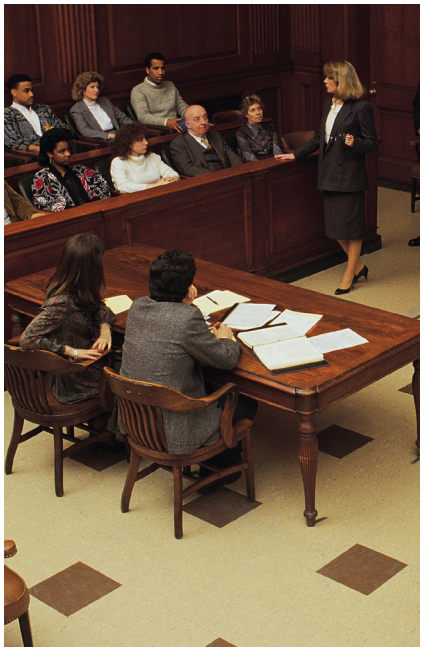
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ARE YOU A SELF-PROCLAIMED OR A RECOGNIZED EXPERT?

PART 1

BY DAVID J. WITZ



Advisors assist most fiduciaries with the responsibility to manage trillions of dollars of other people's money in the increasingly complex private pension system. As ERISA has evolved, so has the role of the advisor and the need for fiduciaries to retain advisors with subject-matter expertise.

The following discussion of expertise is based on the author's experience as an expert witness in ERISA litigation and the development of an advisor expertise evaluation system. Not all advisors can be experts at a level that can survive the scrutiny expert witnesses must endure, but an understanding of expertise in the legal and academic sense of the term holds lessons for all advisors no matter how advanced their current practice. This discussion will focus on the criteria an attorney uses to evaluate experts, why this criterion is appropriate for the plan sponsor to consider, and what an advisor can do to mitigate litigation risk. This is part 1 of a two-part series.

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According to *The Cambridge Handbook of Expertise and Expert Performance*, regarded by many as the comprehensive source on the subject of expertise since its publication in the early 1980s, the study of subject-matter expertise can be dated back to early Greek civilization. It has continued to progress at an accelerating rate over the centuries. Besides the *Handbook* there are two other primary standards relied upon to determine the qualifications of an expert used in court proceedings. They are: Rule 702 of the Federal Rules of Evidence, and the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and its progeny of later cases.

The Federal Rules of Evidence regulate and govern the admission of expert testimony that a judge or jury may use to understand the evidence and reach a verdict. The U.S. Supreme Court clarified these standards in the *Daubert* decision by directing judges to act as "gatekeepers" to limit admissible evidence or expert testimony to that which is both relevant and reliable. Both the Federal Rules of Evidence and *Daubert* are undeniably affected by the work of academia in regards to evaluating the domain of expertise.

"Expertise, by definition, refers to the manifestation of skills and understanding resulting from the accumulation of a large body of knowledge," says the *Cambridge Handbook*. "Therefore it is harder to become an expert than to be one… Becoming an expert in almost anything requires literally years of work."

Based on these existing standards, if an attorney asked you to identify the top 10 advisors for an expert witness engagement, whom would you name and what are your reasons? Would your list be the same if the person asking the question represented a magazine that published an annual list of top advisors?

If the names on each list are different, why? Finally, which list would your name be on, would you be on both lists and, if so, why? These are important questions that reveal how you define expertise, whether you perceive yourself as an expert, and how your definition and perception of expertise may differ from the standards currently relied upon in court proceedings.

Historically, the primary criterion used to measure advisor expertise in the market has been directly tied to success in accumulating assets under management. This is certainly an appropriate criterion to consider when evaluating sales experience but is it possible that all it reveals is a superior salesperson rather than a subject-matter expert? Sales experience and success are important to any organization interested in growing, but sales experience/success is not necessarily a reliable indicator of ERISA expertise, especially for an attorney seeking a subject-matter expert.

The attorney's decision to retain an advisor will depend on many factors but in my experience the decision falls into four broad categories: experience, education, perspective, and the ability to communicate clearly, concisely, and effectively under pressure. Each category is analyzed in more detail.

EXPERIENCE

Experience is a critical criterion in establishing expertise. By most academic measurements, it takes 10 years of experience to establish subject-matter expertise. In other words, just because an advisor has been in the industry for 30 years doesn't mean the advisor is an expert in anything. In fact, it just may be a reflection of an advisor's ability to survive. Mediocre advisors typically have few retirement plan clients, offer little support or service, invest little time or capital in developing expertise, and fail to seek out education and training from other experts.

The pervasiveness of mediocre advisors should come as no surprise when you consider how low the barriers to enter the retirement industry are for an advisor. For example, in my home state of North Carolina, the experience and educational requirements to become licensed as a hair stylist are more extensive and more difficult than those required to become an investment advisor. In short, a clean criminal record, the ability to pass a test, and the financial wherewithal to pay a $375 state fee are the only criteria necessary to become an investment advisor in North Carolina. This low barrier to entry permits dilettantes to enter the industry and secure engagements as retirement plan advisors based on a personal relationship despite little or no actual experience or expertise.

Plan sponsors are best advised to adopt legal counsel's lead to retain advisors who have developed expertise over long periods of time by engaging in extensive practice and accumulating extensive experience in a subject matter. To determine the advisor's qualifications, it's logical, appropriate, and prudent that a plan sponsor would query an advisor no differently than an attorney before an engagement to determine when the advisor secured the first retirement plan client, the number of retirement plan clients the advisor services, the percentage of gross revenue an advisor derives from retirement business, and the common services the advisor provides to all plans. Answers to these questions and others provide the plan sponsor or attorney with the ability to assess the depth and breadth of an advisor's experience. With information in hand, a plan sponsor or attorney seeking an expert can avoid engaging an advisor who lacks the necessary experience to fulfill the requirements of the engagement or deliver the services promised.

EDUCATION

Only a few universities offer classes on ERISA, so it's difficult to find an expert who has undergraduate or graduate-level academic experience. However, the industry does provide

numerous opportunities for advisors to build a substantial knowledge base through conferences and self-study designations or certifications. Books like ASPPA's *401(k) Fiduciary Governance: An Advisor's Guide* by Pete Swisher should be on every advisor's bookshelf and read and re-read, a form of practice, until it becomes part of the advisor's DNA.

This recommendation should not be taken lightly. An advisor may justify a service, procedure, practice, or policy by referencing a resource like a book that's highly regarded in our industry. If a book is referenced in court, expect the attorney to ask when it was purchased to determine if it was a recent purchase used to justify an action or something that's part of your educational diet. Also, be careful not to take a designation too seriously; opposing attorneys will attack the credibility of a designation based on the lack of qualifications, low cost, and ease of securing the designation. Remember, currently the average cost to secure a law degree from a top-20 law school is $136,707 (www.goodfinancialcents.com/average-cost-law-school-tuition-is-it-worth-becoming-lawyer/), a substantial amount more in cost and time than any currently available ERISA-oriented designation. Be that as it may, a designation, regardless of cost or ease of acquisition, is still a worthy endeavor and an example of commitment to achieve a higher level of knowledge and expertise in the retirement industry.

If you don't have a designation, get one that will properly represent your area of expertise from a reputable organization. In addition, a steady diet of one or two conferences each year is an important indication of an advisor's ongoing pursuit of education and knowledge from other experts. The best conferences are those that have a technical agenda and that attract other technical experts. Studies indicate that experts seek out other experts to fine tune their skills. Annual continuing education requirements for a broker-dealer should not be relied upon as an example of educational pursuits.

PERSPECTIVE

An expert's perspective on an issue is directly correlated to the expert's experience and practical application of case law, the statutes, regulations, and other administrative actions and publications issued by the Department of Labor (DOL). Advisors who have successfully applied creative solutions to complex issues are especially sought after. ERISA experts must deal with the law on a daily basis by interpreting requirements and applying them in practice to client situations. However, the law is the domain of those licensed to practice law and the judicial system to interpret. So, it's not uncommon for an ERISA expert to be accused of practicing law and attempting to school the court on the interpretation of the law.

At the same time, an ERISA expert is obligated to work within the parameters of the law when advising a plan sponsor. It's an unavoidable dilemma and must be carefully navigated with a clear understanding that advisors are not attorneys and that an advisor's recommendations should be prefaced with the suggestion to seek the opinion of outside competent ERISA counsel. That said, an expert's perspective is highly coveted, especially when it's based on a rich history of experience.

ABILITY TO COMMUNICATE

Communicating knowledge in a clear and concise manner is extremely important to a plan sponsor or an attorney. An advisor's capability to communicate knowledge consistently and without hesitation in high-pressure situations, such as depositions or when testifying in court, is a reflection of confidence, knowledge, skill, and experience. It's particularly important for an advisor to expect the unexpected and give a thoughtful pause before answering any question while testifying in a deposition or a court. The unexpected can take on many forms of questions and strategies designed to derail an expert's testimony. For example,

1. Your skeletons will be exposed in the most humiliating way, so take a full-disclosure approach with legal counsel. This means you inform counsel of both previous and pending criminal and financial problems. Background checks are becoming more common to avoid embarrassing confrontations.
2. You may be asked the same questions in the morning and in the afternoon in an attempt to catch you in a contradiction that could be used to challenge your expertise and the validity of your testimony. To avoid any mistakes be pithy, not loquacious.
3. The "good cop, bad cop" routine may be employed to lure you into a sense of self-confidence, only to be followed by a series of personal attacks on your reputation, integrity, and professionalism. Don't take anything personally.
4. The intimidating double-team approach is designed to harass, frustrate, and derail your mojo. This approach pits you against two technically savvy attorneys with access to technology to identify errors in your answers by comparison to the law. Just remember that you're testifying to your experience with applying the technical rules to practical client situations.
5. The scavenger hunt is a tactic designed to intimidate, frustrate, and disrupt your thought process. It starts with a visually bad copy of a law given as an exhibit, followed by a request to answer a question by referencing the exhibit. If the exhibit isn't in a format the expert is familiar with it can heighten stress. But remember, the clock is your friend so take your time to find your answer.
6. You may be deposed by an attorney who participated in

drafting the law you opined on. Though intimidating, remember to focus on your experience in applying the law to practical client situations.

Regardless of the circumstances, pressure, intimidation, credentials, and experience of opposing counsel, you must have good recall, deliver consistent answers in a concise manner, and take no offense to anything said. Memory is important but "I don't recall" is a better answer than guessing. Your deposition is not an interpretation test so ask opposing counsel questions to clarify your understanding before replying.

DANGERS OF BEING AN EXPERT WITNESS

You'd think professionals in the retirement industry develop a thick skin but that's not always the case. Competition permeates the industry in every domain and in a competitive industry, where a zero-sum game is the status quo, losses are tracked and remembered no differently than wins. As a result, advisors accepting the role of an expert witness may encounter a grudge held by the opposing party, especially if that opposing party is a collaborating partner on other business with the advisor. As a result, many advisors who are qualified experts decline to act as an expert witness to avoid a conflict or damage to an existing business relationship.

EXPERT FOR THE PLAINTIFF OR DEFENSE

In my experience, experts for the defense receive a higher hourly rate than experts for the plaintiff. That said, and this is a personal opinion, I don't see any benefit to representing one side or the other because the decision to accept an expert-witness engagement is based on the claims you feel you can support. Also, I haven't found that once you represent one side you cannot represent the other. If that were the case, attorneys wouldn't



jump ship from plaintiff to defense and vice versa. However, representing the other side with a position that opposes one you've previously taken is a challenging credibility buster that must be carefully navigated. Don't be surprised if counsel would look for another expert to retain if you were on the opposite side of a past issue.

WHAT ADVISORS CAN DO TO ELEVATE THEIR POSITION AS EXPERTS

Plan sponsors that lack specific ERISA knowledge need to retain the services of an advisor who has the needed expertise in order to meet their fiduciary obligations. At the same time, advisors need to communicate their expertise without embellishment to secure new engagements and mitigate personal litigation risk. For various reasons, some expert advisors are well-suited for expert witness engagements but not all.

Regardless of an advisor's interest in expert witness engagements, an advisor needs to take the appropriate steps to achieve and maintain expert status in a given domain. This then begs the question, what are the determining factors and what should an advisor do to establish and maintain a claim of expertise?

The next article will address what specific actions advisors can and should take to secure their claim of expertise. PC



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